

# CLIENT ALERT

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## CONSTRUCTION LAW

### CAVEAT CONTRACTOR: ARIZONA COURT OF APPEALS INTERPRETS PROMPT PAY ACT AS “PROMPT BILLING ACT” TO DENY RELIEF TO UNPAID CONTRACTOR

by Todd A. Baxter

The Arizona Court of Appeals recently denied a contractor’s claim that the owner had violated Arizona’s prompt pay act (“Prompt Pay”) despite the owner’s admission that it had not paid the contractor or objected to the payment application within the statutory time.<sup>1</sup> The court’s reason for denying the claim? The payment application included items not supplied within “the preceding thirty day billing cycle.”<sup>2</sup> That’s it.

The contractor explained that imposing a strict thirty-day billing cycle would up-end the usual dealings between contractors and subcontractors and create problematic situations regarding materials that are often acquired, stored, and installed during *different* billing cycles.<sup>3</sup> The court did not disagree, but stated that such a potential impact made no difference to its ruling. Instead, it noted that if a statute’s “plain language” results in awkward procedures, or leads to a harsh result” (as it seemed to acknowledge happened here)<sup>4</sup>, it is up to the legislature to correct the language, not the court.

Most surprising, though, is not that the court found the owner had a right to object to being billed for labor and materials supplied more than thirty days ago (which might be justified), but that it found the owner *was not obligated to object* or explain its reasons for withholding payment. Despite paying lip service to Prompt Pay’s primary purpose of requiring owners to object to problems early *so that* those involved in the work (contractors, subcontractors, and suppliers) receive, yes, “prompt payment,”<sup>5</sup> the court concluded that the thirty-day billing cycle referenced in the statute imposes an obligation on the contractor in order to “benefit from” Prompt Pay.<sup>6</sup> If labor or materials are supplied, but are not billed until after the next regular billing or estimate, the owner may withhold payment for those items – without objecting to them – and not violate Prompt Pay.<sup>7</sup>

A billing cycle that requires owners to either make payment or state objections within a specified time after each billing is in keeping with Prompt Pay’s purpose; depriving contractors entirely of Prompt Pay’s protections – 18% interest and attorneys’ fees – for work not billed within thirty days of performance, is not.

The court may be right that the legislature needs to revise the language of Prompt Pay to avoid the potential for awkward procedures and harsh results. Until that happens (and don’t hold your breath), contractors should be careful to include in every “billing or estimate”<sup>8</sup> all work performed and materials supplied during any given thirty-day billing cycle, and shift the burden to the owner to object to any items it believes should not have been included.

<sup>1</sup> *SK Builders, Inc. v. Smith*, Ariz. Adv. Rep. 15 (App. 2019).

<sup>2</sup> *Id.* at 16, ¶ 12-14.

<sup>3</sup> *Id.* at 16-17, ¶ 15.

<sup>4</sup> *Id.* at 17, ¶ 18.

<sup>5</sup> *Id.* Quoting *Stonecreek Bldg. Co. v. Shure*, 216 Ariz. 36, ¶ 16 (App. 2007) (quotation and internal citation omitted).

<sup>6</sup> *Id.* at 16-17.

<sup>7</sup> An owner would still be required to pay for non-defective work, and potentially be exposed to contract rate interest, but the contractor’s leverage under Prompt Pay is removed.

<sup>8</sup> *Id.* At 16, ¶ 12 (quoting Prompt Pay)

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FOR MORE INFORMATION CONTACT:



**Todd A. Baxter** is a member in Dickinson Wright’s Phoenix office. He can be reached at 602-889-5345 or [tbaxter@dickinsonwright.com](mailto:tbaxter@dickinsonwright.com).